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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 390

BROAD RIVER POWER COMPANY, APPELLANT,

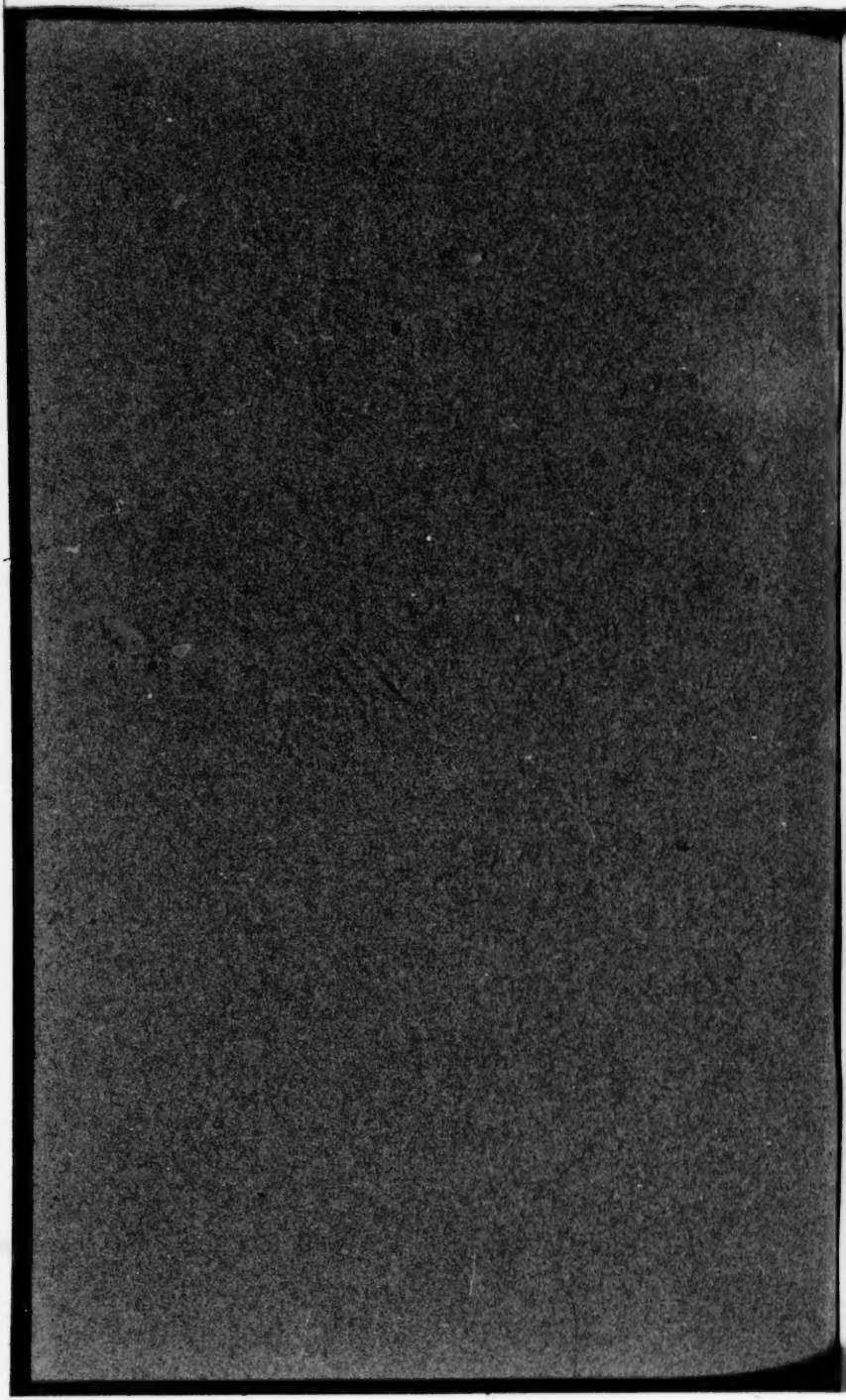
vs.

WALTER G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED SEPTEMBER 22, 1932

(37,087)



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INDEX

	Original	Print
Record from district court of the United States, eastern district of South Carolina	1	1
Caption (omitted in printing)	1	
Bill of complaint	2	1
Exhibit "A"—Revenue act	14	10
Application for temporary restraining order and interlocutory injunction	21	14
Rule to show cause	24	16
Answer	26	17
Affidavit of W. L. Yoder	31	20
Affidavit of Norman H. Coit	32	21
Opinion, Parker, J.	36	23
Findings of fact and conclusions of law	61	46
Decree denying interlocutory injunction	65	50
Stipulation and agreement of counsel as to record	66	51
Stipulation and agreement of counsel as to hearings	67	51
Order calling together three-judge court	68	52

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1932

	Original	Print
Opinion, Parker, J.	69	53
Findings of fact and conclusions of law	74	57
Final decree dismissing bill	79	60
Restraining order pending appeal	80	61
Bond for restraining order pending appeal (omitted in printing)	82	
Petition for appeal, assignments of error, and prayer for reversal	84	62
Order allowing appeal	86	64
Bond on appeal, $250.00 for costs, cash deposited	86	64
Order extending time to file transcript of record	87	64
Stipulation as to contents of transcript of record	88	65
Citation and service (omitted in printing)	89	
Clerk's certificate (omitted in printing)	90	
Statement of points to be relied upon and designation of parts of record to be printed	91	66

[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

In Equity

BROAD RIVER POWER COMPANY, Plaintiff,

v.

WALTER G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission, Defendants

BILL OF COMPLAINT—Filed June 6, 1931

To the Judge of the District Court of the United States for the Eastern District of South Carolina:

The plaintiff, Broad River Power Company, presents this its Bill of Complaint against the defendants, Walter G. [fol. 3] Query, J. P. Derham and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission, and for a cause of action says:

First. That the plaintiff Broad River Power Company is a public service corporation duly organized and existing under and by virtue of the laws of the State of South Carolina, and having its principal office and place of business in said State, and is a citizen and resident of said State.

That said Broad River Power Company was duly chartered under the general laws of South Carolina, to engage in the business of serving the public with electric energy for light, heat and power. That for the past six years or more said Broad River Power Company has been generating electricity by hydro and steam power and selling the same, and in all respects performing its corporate and public functions.

Second. That the defendant Walter G. Query is a citizen of the State of South Carolina and a resident of the County of Spartanburg in the Western District of South Carolina;

the defendant J. P. Derham is a citizen of the State of South Carolina and a resident of the County of Horry in the Eastern District of South Carolina; that the defendant Frank C. Robinson is a citizen of the State of South Carolina and a resident of the County of Richland in the Eastern District of South Carolina; that the said defendants Walter G. Query, J. P. Derham and Frank C. Robinson are all members of and constitute the South Carolina Tax Commission which is an administrative body created and existing under and by virtue of the Constitution and laws of the State of South Carolina with offices in the City of Columbia, in the Eastern District of South Carolina.

[fol. 4] Third. That this suit involves questions arising under the constitution and laws of the United States and of the State of South Carolina hereinafter specifically set forth, and that the amount involved exclusive of interest and costs exceeds the sum of $3,000.

That this suit is of a civil nature and attacks the validity of a certain Act of the General Assembly of the State of South Carolina aproved 9th May, 1931, entitled "An Act to raise revenue for the support of the State Government by the impostion of an excise tax upon electric power generated and sold within this State," hereinafter more particularly referred to and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, which said Act purports to impose upon this plaintiff, in addition to all other taxes of every kind now imposed by law, an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power manufactured or generated and sold, said tax to be paid to and collected by the South Carolina Tax Commission, which Commission is given power under the terms of said Act to enter upon the premises of this plaintiff, and to examine its instruments, books, records, etc., and to make rules and regulations pertinent to the enforcement of said Act, which shall have the full force and effect of law.

That under the terms of said Act it took effect on May 1st, 1931, and subjects this plaintiff to the payment of said tax between the 1st and 10th of June, 1931, and each month thereafter; that failure to pay said tax when due each month will subject this plaintiff according to the terms of said Act, to a penalty of twenty-five per cent of the amount of tax found to be due, and that all taxes and penalties shall

[fol. 5] be construed to be a debt payable to the State and constitute a first lien upon all the property of this plaintiff.

That said Act further provides that if the tax imposed by the Act is paid under protest, that this plaintiff may at any time within thirty days after making such payment under protest, but not afterwards, bring an action against the South Carolina Tax Commission in any court of competent jurisdiction for the recovery back of such tax so paid under protest, with interest at the rate of four per cent., whereas plaintiff, in order to carry on its public business, is required to borrow funds from time to time and to pay interest thereon at a rate in excess of six per cent.

Fourth. That the South Carolina Tax Commission has already undertaken initial steps for the carrying into effect of said Act and unless enjoined and restrained threatens to collect a tax under said Act on all electricity generated by this plaintiff.

Fifth. That the further object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by said Act approved 9th May, 1931, and that the same may be declared to be illegal, null and void, in that it unlawfully infringes plaintiff's constitutional rights, and if enforced will deny to the plaintiff the equal protection of the law, and will amount to the unlawful taking of plaintiff's property without compensation, and without due process of law, and will in fact amount, in connection with other taxes payable to the State of South Carolina, to confiscation of plaintiff's property without compensation, and without due process of law; in violation of the Constitution of the United States and of the State of South Carolina as hereinafter set forth.

[fol. 6] Sixth. This plaintiff avers that its hydro electric and steam generating stations produced during the year 1930 one hundred sixty-nine million thirty-eight thousand nine hundred ten kilowatt hours of electric energy, and the tax imposed by the Act in question will amount to approximately $85,000 per annum, or more, and plaintiff avers that said Act is illegal, null and void, and should be so declared upon the ground that it violates Sections 5 and 6 of Article I of the Constitution of South Carolina, and Section 1 of Article X of the Constitution of South Carolina, and Sec-

tion 10 of Article I of the Constitution of the United States, and also the Fourteenth Amendment to the Constitution of the United States, in that the said Tax so imposed by the said Act in its practical operation and effect will deny to this plaintiff the equal protection of the laws, will take its property without due process of law, for the reason that inter alia the said tax is discriminatory; impairs the obligation of plaintiff's contract with the State of South Carolina; is not graduated in accordance with the provisions of the Constitution of the State of South Carolina, and is confiscatory of plaintiff's property.

Seventh. Plaintiff alleges further that on or about May 1st, 1931, pursuant to Act of the General Assembly of South Carolina, a license or privilege tax amounting to three mills on its entire gross receipts for the year 1930 was paid the State of South Carolina by plaintiff, which, under the existing provisions of law, entitled it to the right to carry on its business in the State of South Carolina for the year 1931, and that further this plaintiff has already incurred under another Act of South Carolina, an obligation to pay to the State of South Carolina an additional license, excise or [fol. 7] privilege tax amounting to approximately seven mills upon the assessed value of its real and personal property as fixed by the South Carolina Tax Commission, and that the imposition of the additional license or privilege tax provided for in the Act in question will amount to an impairment of this plaintiff's contract with the State of South Carolina in violation of Section 10 of Article I of the Constitution of the United States, and Section 8 of Article I of the Constitution of South Carolina.

Eighth. That there are engaged in the business of distributing and selling electricity within the State of South Carolina a number of public service corporations which purchase a large amount of the electricity, distributed and sold by them, from other companies which generate said electricity, and that under the provisions of the statute hereinbefore referred to, said public service corporations are exempt from the payment of any tax on the electricity purchased and resold by them.

That electric energy generated by oil or combustion engines is of the same character as electricity generated by hydro-electric or steam generating plants, and that there

are in operation in the State of South Carolina plants which generate electricity by oil or combustion engines, and that no tax is levied on electricity so generated by the terms and provisions of the statute hereinbefore referred to.

That the discrimination hereinbefore in this paragraph alleged denies to this plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Section 5, Article I of the Constitution of South Carolina.

Ninth. Plaintiff further avers that the tax imposed by said Act is not graduated in accordance with the provisions [fol. 8] of Section 1 of Article X of the Constitution of South Carolina, in that the said tax is imposed without regard to the amount of business done, or to the value of the kilowatt hour generated by the several public utilities affected by the terms and provisions of said Act.

Tenth. Plaintiff further avers that the tax in question is a license tax for the privilege of doing business, and is not permitted by the Constitution of the State of South Carolina, which provides that the legislature may impose "a graduated license on occupations and business," for the reason that the proposed tax in question is the third different license tax imposed upon electric power companies under existing statutes of the State of South Carolina.

Eleventh. That the plaintiff, as a public utility corporation, is now required to pay a tax of three mills on every dollar of gross revenue received by it, a tax of three mills on the true value of its property which amounts to seven and one-half mills on the value of its property by reason of the ratio at which other property within the State is assessed for taxation. That in addition thereto the plaintiff is required to pay an income tax to the State of South Carolina, in a larger amount than is paid by other corporations not engaged in operating a public utility, and that the plaintiff pays a tax for the support of the Railroad Commission of South Carolina, municipal license taxes in every community which it serves, gasoline taxes on all gasoline consumed in its operations, automobile license taxes on all its motor vehicles and ad valorem taxes on its property to the State, Counties, Municipalities and special school districts in which its operates. That the tax purported to be

imposed by the statute hereinbefore referred to is oppres-
[fol. 9] sive and unlawfully discriminates against the plaintiff and results in the taking of its property without compensation and without due process of law and denying the plaintiff equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the United States Constitution, and Section 5 of Article I of the Constitution of South Carolina.

Twelfth. That the plaintiff, in the operation of its electric business, generates a large amount of electric energy which is used by it on its own premises for lighting same, power purposes, and for the use of its employees who reside on premises owned by the plaintiff, and that in addition thereto plaintiff is engaged in the operation of a street railway system in the City of Columbia, South Carolina (which is and can be operated only at a loss, excluding from consideration any compensation for electricity generated), in which operation it consumes a large amount of electric energy generated by the plaintiff. That the plaintiff also uses a large amount of electricity generated by it for the purpose of maintaining voltages on transmission and distribution lines, which electricity so used by the plaintiff is used for its own purposes. That by the terms of the statute hereinbefore referred to the plaintiff is required to pay a tax on the electricity so generated by it and used for its own purposes, and supplied to its employees on its own premises, whereas other industrial plants manufacturing or generating electricity for their own use or for use upon their own premises by their operatives or employees are not required to pay a tax thereon.

That by reason of such discrimination the plaintiff is denied the equal protection of the laws guaranteed by the Constitutional provisions hereinbefore referred to.

[fol. 10] Thirteenth. Said Tax Act violates the 14th Amendment to the Constitution of the United States and Section 5 of Article I of the South Carolina Constitution in that it denies to this plaintiff, engaged in the business of generating or producing electricity and electrical energy in the State of South Carolina, the equal protection of the laws and renders it and its property liable to be taken without due process of law, all in violation of the 14th

Amendment to the Constitution of the United States in that the penalties fixed for the failure to comply with any of the provisions of the Tax Act, including the making of such reports as are required by the Tax Act, and the payment of the tax imposed and levied thereunder, and for failure to open for inspection the books and records of the company, as is provided by Section 8 of the Tax Act, are so excessive as to intimidate, coerce and compel any persons coming under the Tax Act, including this plaintiff, to comply with the provisions of said Tax Act without the freedom of resorting to the court to test the validity of the provisions of said Tax Act.

Fourteenth. Plaintiff further avers that the fines and penalties attendant upon a failure to pay the tax imposed by the Act in question, and the institution of a multiplicity of suits, to-wit: one every thirty days in order to comply with the provisions of the Act relating to payment of the tax under protest, effectually operate to deprive, and actually will deprive plaintiff of its property without due process of law in violation of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States.

Fifteenth. Plaintiff specifically charges and avers that the statute in question is illegal, null and void and should be set aside, annulled and temporarily and permanently enjoined upon, inter alia, the following grounds:

[fol. 11] (1) That such statute unlawfully invades plaintiff's constitutional rights, protected by the Constitution of the United States, and particularly by Section 10, Article I and the Fourteenth Amendment to the Constitution of the United States, and plaintiff sets up and claims the protection of its rights so guaranteed by the constitutional provisions aforesaid.

(2) That the enforcement of said statute would constitute a taking of plaintiff's property without due process of law, deny to plaintiff the equal protection of the law, take the plaintiff's property without compensation, and impair the operation of its contract with the State of South Carolina, in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the

United States, and also in violation of Sections 5 and 8 of Article I of the South Carolina Constitution.

(3) That such statute is violative of Section 1 of Article X of the South Carolina Constitution.

Wherefore plaintiff alleges that there is no adequate redress or remedy at law available to it to protect its property and property rights from the imposition of said tax and the fines and penalties for a non-payment thereof, and that it is, therefore, necessary for plaintiff to come into a court of equity and invoke the extraordinary remedies of such courts to avoid a multiplicity of suits, excessive and vexatious litigation, and to prevent irreparable injury, loss and damage to plaintiff's property and rights, and the taking thereof in contravention of the Constitutions of the State of South Carolina and the United States.

Wherefore, the premises being considered, and being without adequate remedy at law plaintiff prays this [fol. 12] Honorable Court to grant plaintiff a writ of subpœna directed to the above named defendants, and each and every of them, commanding them to appear in this Court and to answer (but not under oath, answer under oath being expressly waived), the averments of this complaint and for the following general and specific relief:

(1) That said Act of the General Assembly of South Carolina approved 9th May, 1931, be declared to be invalid and in violation of the Constitutional rights of this plaintiff, and null and void, for the reasons hereinbefore set out.

(2) That in view of the immediate and irreparable loss and damage which will be sustained by this plaintiff by the payment of the tax imposed by the said Act, and the multiplicity of suits necessary to protect its rights, plaintiff prays that the above named defendants, and each of them, be severally and jointly perpetually enjoined from enforcing, or from taking any steps to enforce, or giving any effect to said Act of May 9th, 1931, and from attempting directly or indirectly to compel this plaintiff to comply with the terms and provisions of said Act, and from commencing any suit or proceeding against this plaintiff, or establishing any lien upon its property, or taking steps to enforce or collect any penalties, fines or forfeitures provided or imposed under the said Act in question, or any

other law of the State of South Carolina, by reason of the omission or refusal of this plaintiff to comply with the terms of said Act of 9th May, 1931.

(3) Plaintiff further prays that upon a hearing for a preliminary injunction being had, a preliminary order of injunction of like character issue, and that such injunction pendente lite be granted against each and all of said defendants, enjoining and restraining them until final de-
[fol. 13] cree in all of the respects as to which a perpetual injunction is sought in the foregoing prayer; and that upon final hearing in this cause, this Honorable Court perpetually enjoin the collection of the taxes imposed by said Act of 9th May, 1931, and any effort or attempt upon the part of any or all of the defendants to enforce the same, and to make permanent by injunction the relief hereinbefore prayed, and that this Court declare the said Act to be illegal, null and void, upon the grounds hereinbefore set forth.

(4) That, in any event, an injunction be granted, as hereinbefore prayed, restraining and enjoining the collection of any and all taxes imposed by said Act in question, or any attempt on the part of any of said defendants to enforce a compliance with said Act, or to impose any fines or penalties for the violation or disregard thereof, pending the final decision and order of this Honorable Court in this cause.

(5) Plaintiff further shows that it will suffer irreparable loss, damage and injury, and an illegal taking of its property, unless a temporary restraining order is issued by this Honorable Court on or before June 10th, 1931.

Wherefore plaintiff prays that each and all of said defendants be restrained from collecting said tax, or from enforcing, or taking any steps to enforce the terms and provisions of said Act, until the further order of this Honorable Court.

(6) And plaintiff further prays for all such other and further relief, both general and specific, as the exigencies of the case may require, or to which in equity it may be entitled.

W. C. McLain, Geo. M. LePine, Solicitors for Plaintiff.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax Upon Electric Power Generated and Sold Within this State.

Section 1. Be it enacted by the General Assembly of the State of South Carolina:

(a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and collected [fol. 15] by South Carolina Tax Commission: Provided, That if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed: Provided, Further, That the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this

State until such power has lost its interstate character and immunities: Provided, Further, That the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horsepower or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, Further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

Section 2. Every person, firm or corporation engaged in the business of manufacturing, generating or selling electric power in this State shall provide themselves with and keep the necessary instruments to show the amount of electric power manufactured, generated or sold, expressed in kilowatt hours, and shall keep permanent, legible records showing the amount of power, expressed in kilowatt hours, manufactured, generated or sold each day. Such records and instruments shall be subject to examination by the Tax Commission or its duly authorized representatives at any time during business hours.

[fol. 16] The South Carolina Tax Commission shall administer and enforce the tax imposed by this Act. It shall have the power to enter upon the premises of any tax payer and to examine, or cause to be examined, any of the instruments, books, records, etc., and to secure any other information directly or indirectly concerned in the enforcement of this Act. Also, make rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law.

Any person, firm or corporation required to keep either the necessary instruments or records prescribed in this Section shall be subject to a penalty One Hundred ($100.00) Dollars per day for each day's omission to keep either the required instruments or required records. Such penalties to be collected in the same manner as herein provided for the collection of delinquent taxes: Provided, upon reasonable cause shown, the South Carolina Tax Commission may remit or refund the said penalties in whole or in part.

Section 3. Every person, firm or corporation subject to the provisions of this Act shall between the first and tenth of each month, make a true and correct return to the South Carolina Tax Commission in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month and remit the tax therewith.

In case of failure to make a true and correct return, the Tax Commission shall make the same upon such information as it may be able to obtain, assess the tax due thereon, and add a penalty of twenty-five per cent, and in case of failure to pay the tax, the South Carolina Tax Commission shall add a penalty of twenty-five per cent, whereupon the [fol. 17] South Carolina Tax Commission shall mail notice of the amount of taxes and penalty to the party failing to make such return or pay the tax, and if the tax and penalty is not paid within ten (10) days after mailing such notice, execution shall be issued in the manner and with the force provided hereafter in this Section. If any taxes or penalties imposed by this Act remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution directed to the Sheriff of any County of the State, commanding him to levy upon and sell the real and personal property of the tax payer found within his county, for the payment of the amount thereof with penalties and the costs of executing the warrant, and to return such warrant to the Tax Commission and to pay it the money collected by virtue thereof.

The Sheriff to whom such execution is directed shall proceed to enforce same in the same manner provided by law for the enforcement of an execution issued by a County Treasurer against a delinquent tax payer. That the taxes and all penalties herein provided for, shall be held as a debt payable to the State by the party against whom the same shall be charged, and all such taxes, penalties and assessments shall be first lien in all cases whatsoever upon all property of the party charged therewith.

Section 4. That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the

clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall [fol. 18] have been rendered. No caption of any Section or set of Sections shall in any way affect the interpretation of this Act or any part thereof: Provided, That the collection of the taxes or penalties imposed under the provisions of this Act shall not be stayed or prevented by any injunction, writ or order issued by any Court or Judge thereon. In all cases in which any taxes or penalties are required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes or penalties so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such taxes or penalties are charged, or against whom such step or proceedings shall be taken, shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes or penalties notwithstanding, under written protest, in such funds and monies as the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made South Carolina Tax Commission shall make proper note that the same was paid under written protest and notify the State Treasurer that such taxes or penalties were paid under protest; that the person, firm or corporation so paying said taxes or penalties may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the South Carolina Tax Commission for the recovery thereof in any Court of competent jurisdiction and/or in proper cases in the Federal Courts and if it be determined in said action that such taxes or penalties were wrongfully and illegally collected for any reason going to the merits, then the Court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum. Whereupon [fol. 19] the Tax Commission shall issue its warrant upon the State Treasurer for refunding the taxes and penalties so paid, which shall be paid in preference to other claims against the treasury.

Section 5. That the South Carolina Tax Commission may, in its discretion, compromise any action arising under the provisions of this Act, either before or after prosecu-

tion commenced. The South Carolina Tax Commission may, upon good cause shown, remit any penalties accruing under this Act, in whole or in part.

Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, Further, That for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government.

Section 7. Any foreign corporation required to pay a tax hereunder for the year 1931, which shall not, for any cause whatsoever, have paid such license fee or tax, in addition to the payment of all license fees and taxes now or hereafter required by law, shall as an additional license fee or tax, for the year 1932, pay an amount equal to the license fee or tax provided for in this Act for the year 1931, and the payment of such additional license fee or tax for the year 1932 shall be a condition and part of the terms upon which they are allowed to enter this State and do business herein for the year 1932.

Section 8. The tax provided in this Act shall be calculated and paid on all electric power manufactured, generated or sold, on and after the first day of May, 1931.

Section 9. That this Act shall take effect immediately upon its approval by the Governor.

Approved the ninth day of May, 1931.

[fol. 20] *Duly sworn to by J. F. McKenna. Jurat omitted in printing.*

[fol. 21] IN UNITED STATES DISTRICT COURT

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR INTERLOCUTORY INJUNCTION

Now comes the above named plaintiff and shows to the Court as follows:

That it has instituted in this Court by Bill of Complaint duly filed, an action against the above named defendants as members of the South Carolina Tax Commission, as will more particularly appear from the Bill of Complaint

which is now referred to and made a part of this application. The object and purpose of this suit is to secure from this Honorable Court an interlocutory injunction, and a decree enjoining permanently and perpetually the defendants, who constitute the South Carolina Tax Commission, from enforcing or taking any steps to enforce, or instituting any proceeding whatsoever towards enforcing or giving effect [fol. 22] to, a certain Act of the State of South Carolina approved May 9th, 1931, and entitled "An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State," set forth in said Bill of Complaint, or to require the plaintiff to comply with any of the provisions thereof, as well as from commencing any suit or proceeding against the plaintiff to enforce or collect any penalties, fines or forfeitures provided for or imposed under said Act, or under any other law of the State of South Carolina, by reason of anything done or omitted to be done by this plaintiff contrary to the terms or provisions of said Act. The further object of this suit is to have this Act declared to be illegal, null and void, and of no force and effect upon the grounds specifically set forth in the Bill of Complaint, which is hereto attached and made a part of this motion.

Plaintiff sets forth in said Bill, alleges and shows that it will suffer irreparable loss, damage and injury, unless a temporary restraining order is issued by the Court pending a hearing upon its application for an interlocutory injunction, as prayed for in said Bill of Complaint, and one of the objects and prayers of said Bill is that upon a hearing for a preliminary injunction being had, then under Section 266 of the Judicial Code an interlocutory injunction, as prayed for in said Bill, be issued, enjoining and restraining the defendants, and each of them, until a final decree herein, in all respects as to which a perpetual injunction is sought in said Bill.

[fol. 23] Wherefore application is now made:

(1) For a temporary restraining order to issue at once, enjoining and restraining all of said defendants from enforcing, or attempting to enforce, the aforesaid Act approved May 9th, 1931, until the further order of this Court; and this plaintiff, as more fully set forth in the Bill of Complaint, avers and shows that said temporary

restraining order is necessary to prevent immediate and irreparable injury, loss and damage to plaintiff, its rights and property, and to preserve the status quo until plaintiff's application for an interlocutory injunction can be set down for hearing and heard upon notice duly given, because payments under the said Act approved 9th May, 1931, attacked in this proceeding and sought to be declared null and void, will under the terms of said Act become payable on or before June 10th, 1931, and plaintiff will be compelled to comply therewith, or incur the penalties provided by law for the violation or disregard thereof, unless the temporary restraining order, for which application is now made, be granted and the enforcement of said Act be restrained until the application for interlocutory injunction can be heard and disposed of under Section 266 of the Judicial Code; and

(2) Application is likewise now made under Section 266 of the Judicial Code for an interlocutory injunction as prayed in said Bill, and upon the grounds and for the reasons therein set forth, and this Honorable Court is petitioned to call to its assistance to hear and determine this application, two other Judges, and that the statutory notice of the hearing of this application be given to the Governor and to the Attorney General of the State of South Carolina, and to all of the defendants to the said Bill, and that an order issue in due course requiring the [fol. 24] defendant to show cause at the time and place to be fixed by this Honorable Court according to law, why said interlocutory injunction should not issue as prayed for in the Bill.

This application is based upon the verified Bill of Complaint which has been duly filed therein.

W. C. McLain, Geo. M. Le Pine, Plaintiff's Solicitors.

IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE ON APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

Upon reading the verified Bill of Complaint this day filed in this cause, and the plaintiff having applied for an interlocutory injunction, upon consideration thereof:

It is ordered that the defendants Walter G. Query, J. P. Derham and Frank C. Robinson, constituting the South [fol. 25] Carolina Tax Commission, do show cause before me in the United States Court Room, at Charleston, South Carolina, on the 9th day of June, 1931, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, why a Court consisting of three judges as provided by Section 266, amended, of the Judicial Code, should not be convened for hearing the application for interlocutory injunction and why, in the meantime, and until the hearing of said application, and pending the further order of this Court, the said defendants should not be restrained from enforcing, or taking any steps to enforce, directly or indirectly, the terms and provisions of an Act of the General Assembly of South Carolina approved 9th May, 1931, entitled "An Act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State."

Ernest F. Cochran, United States District Judge.

Charleston, S. C., June 6, 1931.

[fol. 26] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 3, 1931

The joint and several answer of the defendants South Carolina Tax Commission, Walter G. Query, J. P. Derham and Frank C. Robinson, as members of South Carolina Tax Commission, to the bill of complaint of the plaintiff above named, would respectfully show:

First. Defendants admit the allegations contained in the First paragraph of the bill of complaint.

Second. Defendants admit the allegations contained in the second paragraph of the bill of complaint, except that Frank C. Robinson is a resident of the county of Richland, the said Frank C. Robinson being a citizen and resident of the county of McCormick, State of South Carolina.

Third. Defendants admit the allegations contained in the third paragraph of the bill of complaint, but respectfully crave reference to the Act of the General Assembly

of the State of South Carolina as more fully setting forth [fol. 27] its purport and terms than as set forth in the Third paragraph of said bill of complaint.

Fourth. Defendants admit the allegations contained in the fourth paragraph of the bill of complaint. Defendants further aver, upon information and belief, that plaintiff does not own or operate any plant or facilities for generating and manufacturing electricity outside of the State of South Carolina.

Fifth. Answering the fifth paragraph of the bill of complaint, defendants admit that the object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by the Act approved 9th of May, 1931, and that the same be declared illegal, null and void, but these defendants deny that said Act infringes any of plaintiff's constitutional rights, either Federal or State.

Sixth. Defendants have not knowledge or information sufficient to form a belief as to how much electric power is generated by plaintiff nor what the taxes thereon would amount to, but they specifically deny that said Act is illegal, null and void, and that it does not contravene any of the provisions of the Federal or State Constitution therein alleged, or otherwise.

Seventh. Defendants admit the payment of the several other taxes alleged in the seventh paragraph of the bill of complaint, but specifically deny that the State had exhausted its right to tax plaintiff in such other forms as it might elect and that in exacting such other tax there is no impairment of any contract which plaintiff may have had with the State of South Carolina.

Eighth. Defendants have not knowledge or information sufficient to form a belief as to the allegations contained in the eighth paragraph of the bill of complaint; that defend- [fol. 28] ants allege if any electric energy whatsoever is generated by oil or combustion engines within the State of South Carolina, that the electric energy so generated is inconsequential and comparatively so infinitesimal as not to require any consideration in this case.

Ninth. Defendants deny the allegations contained in the ninth paragraph of the bill of complaint.

Tenth. Defendants deny the allegations contained in the tenth paragraph of the bill of complaint.

Eleventh. Defendants admit that plaintiff pays the several taxes enumerated in the eleventh paragraph of the bill of complaint, but they deny each and every other allegation therein contained.

Twelfth. Defendants, upon information and belief, deny so much of the twelfth paragraph of the bill of complaint as alleges that plaintiff is engaged in the operation of a street railway in the city of Columbia, South Carolina, and allege that the said Street Railway in Columbia, South Carolina, is owned and operated by Columbia Railway, Gas and Electric Company. Defendants have not knowledge or information sufficient to form a belief as to the other allegations contained in the twelfth paragraph of the bill of complaint.

Thirteenth. Defendants deny the allegations contained in the thirteenth paragraph of the bill of complaint.

Fourteenth. Defendants deny the allegations contained in the fourteenth paragraph of the bill of complaint.

Fifteenth. Defendants deny each and every allegation contained in the fifteenth paragraph of the bill of complaint.

[fol. 29] For a first, further, separate and distinct defense, these defendants allege that plaintiff has a full, complete and adequate remedy at law, as provided by the Tax Act in question.

For a second, further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill of complaint are insufficient to constitute a valid cause of action in equity.

For a third, further, separate and distinct defense, it appears from the face of said bill of complaint that the supposed grounds of jurisdiction of the Federal Court are frivolous with no facts alleged to show or make it appear that any real substantial Federal question is involved.

Wherefore defendants deny that the plaintiff is entitled to the relief prayed for in the bill of complaint, or any part

thereof, or to any other relief against these defendants, and pray that the bill of complaint be dismissed with costs.

John M. Daniel, Attorney General for South Carolina; J. Fraser Lyon, Attorneys for Defendants.

[fol. 30] *Duly sworn to by W. G. Query. Jurat omitted in printing.*

[fol. 31] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. L. YODER—Filed July 9, 1931

W. L. Yoder being duly sworn, deposes and says:

That he is an officer of the Carolina Power & Light Company, to-wit: its Assistant to the General Manager. That during the month of May, 1931, Carolina Power & Light Company procured electric power and energy from sources of generation in South Carolina as follows:

From Duke Power Company at Wateree and Greenville, South Carolina	7,676,500	K.W.H.
From Lexington Water Power Company at Saluda	6,051,000	K.W.H.
Total	13,727,500	K.W.H.

That the Carolina Power & Light Company sold intrastate in South Carolina during the month of May, 1931, 5,290,365 KWH.

All the above electric power and energy represented by the difference between the amount procured and the amount sold, except what was lost in transformation and transmission, was transmitted from South Carolina into North Carolina; that a portion of the power procured from the Lexington Water Power Company was transmitted from South Carolina to North Carolina.

W. L. Yoder.

Sworn and subscribed to before me this 3rd day of July, 1931. Mary T. Birmingham, Notary Public of Wake County, North Carolina. My commission expires March 11, 1932. (Seal.)

[fol. 32] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF NORMAN H. COIT

STATE OF SOUTH CAROLINA,
County of Richland, ss:

Norman H. Coit, being duly sworn, deposes and says:

1. I reside in the City of Columbia, Richland County, South Carolina, and I am thirty-six (36) years of age. I am a graduate of the University of Colorado, having obtained a Bachelor of Science degree in electrical engineering in 1917. Since that time I have been continuously employed in the supervision of engineering work. From 1924 to 1929 I was General Manager of the Florida Public Service Company, a public utility company engaged in operating electric plants and the distribution of electricity in Florida. Since September, 1929, I have been General Manager and since April, 1930, Vice-President and General Manager of Broad River Power Company and, also, from September, 1929, I have been Vice-President and since December, 1930, Vice-President and General Manager of Lexington Water Power Company. As General Manager of the public utility companies above mentioned I have been directly responsible for the operation of the power plants and electric systems of said companies.

2. Broad River Power Company is a public utility company engaged in operations in the State of South Carolina, with power plants in the City of Columbia, South Carolina, and a large steam and hydro plant at Parr Shoals, South Carolina. During the year 1930 that company produced at its hydro-electric and steam generating stations 169,038,910 [fol. 33] kilowatt hours of electric energy, and deponent estimates that the electric energy produced by said company during the year 1931 will amount to approximately 258,000,000 kilowatt hours.

3. That there are engaged in the business of distributing and selling electricity within the State of South Carolina a number of public service corporations which purchase a large amount of the electricity distributed and sold by them from other companies which generate said electricity. This is true, for example, of the Duke Power Company and Caro-

lina Power & Light Company, which purchase a large amount of electricity from Lexington Water Power Company.

4. That electric energy generated by oil or combustion engines is of exactly the same character as electricity generated by hydro-electric or steam generating plants, and that there are in operation in the State of South Carolina plants which generate electricity by oil or combustion engines. Examples of such plants are the plant of South Carolina Power Company at McClellanville, South Carolina, and the Hardeeville Ice Plant which is owned by a private individual. Each of said plants is of more than ten horse power capacity.

5. That Broad River Power Company in the operation of its electric business generates a large amount of electric energy which is used by it for lighting its own premises and for power purposes on its own premises, the amount so used amounting to approximately 14,000,000 kilowatt hours per year, and that in addition thereto it consumes a large amount of energy which is furnished to its own bona fide employees residing on the premises of the company, the amount so used amounting to approximately 26,000 kilowatt hours per year. In addition thereto Broad River Power Company, pursuant to a judgment of the Supreme Court of South Carolina, is responsible for the operation of the street railway system in the City of Columbia, South [fol. 34] Carolina, which said system is and can be operated only at a loss, excluding from consideration any compensation for electricity generated, and that in the operation of said system Broad River Power Company consumes a large amount of electric energy generated by it, the amount so used amounting to approximately 750,000 kilowatt hours per year. That in addition to these uses by Broad River Power Company it consumes a large amount of electricity generated by it for the purpose of maintaining voltages on transmission and distribution lines, the amount so used amounting to approximately 39,500,000 kilowatt hours per year.

6. That Broad River Power Company paid in taxes to the State of South Carolina applicable to the twelve months ending on December 31, 1930, $279,792.65, and in addition

thereto paid to municipalities for taxes and licenses the sum of $2,730, such taxes being divided as follows:

Income tax	42,433.18
Tax for support of railroad commission	4,026.31
Gross income tax	6,917.59
Three mill tax on true value	24,378.79
Municipal and other licenses	2,730.00
Property taxes (Including municipal & County property tax)	202,036.78

7. That deponent is informed and believes, the source of his information being statements from persons connected with the below named textile plants, that Clifton Manufacturing Company, Victor Cotton Mills, Jackson Cotton Mills, Panola Cotton Mills, Enoree Manufacturing Company and Ware Shoals Manufacturing Company are all textile plants which make a part or all of the electric power used by them, and also furnish electric energy for lighting the houses occupied by their employees.

8. That Broad River Power Company owns and operates in the town of Saluda, South Carolina, a plant for the manufacture of ice, which during the calendar year 1930 consumed 100,165 K.W.H.

That the taxes so paid represented 9.9% of the total op-
[fol. 35] erating revenues of the company and that in addition thereto the company paid Federal taxes to the amount of $35,888.70, the total taxes paid by the company representing 11.2% of its total operating revenues.

N. H. Coit.

Sworn and subscribed to before me this 3rd day of July, 1931. N. O. D. Bultman, Notary Public.

[fol. 36] In United States District Court

Opinion—Filed Sept. 7, 1931

Parker, Circuit Judge:

These are three independent suits instituted to enjoin the enforcement of the South Carolina statute imposing

a tax on the production and sale of electric power. An interlocutory injunction is asked in each, and a court of three judges has been convened pursuant to section 266 of the Judicial Code and the cases have been heard together. Each suit involves an amount largely in excess of what is required for purposes of jurisdiction; and jurisdiction in equity is not controverted and unquestionably exists for the purpose of avoiding a multiplicity of suits.

The statute in question is entitled, "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State"; and the pertinent provisions thereof are as follows:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina:

(a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

"(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

"(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and collected by South Carolina Tax Commission: Pro-

[fol. 37] vided, that if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed; Provided, further, that the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities: Provided, further, that the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horse power or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, further, that the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

* * * * * * *

"Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, further, that for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government."

The statute is attacked from different angles by the complainants in the various suits. The Broad River Power Company generates, sells and uses current within the state of South Carolina; and it attacks both the production and the sales tax of the statute as being violative of the due process and equal protection clauses of the 14th Amendment and similar provisions in the Constitution of South Carolina. The Lexington Power Company generates current within the state of South Carolina which is sold to another company and transmitted to other states; and it attacks the production tax as a burden upon interstate

commerce as to current transmitted to other states, as well as being in violation of the 14th Amendment and similar provisions of the South Carolina Constitution. The South Carolina Power Company, in addition to generating and selling current within the state of South Carolina, brings [fol. 38] in from the state of Georgia current which it sells in South Carolina; and in addition to attacking both the generation tax and the sales tax under the 14th Amendment and the Constitution of South Carolina, it attacks the sales tax in so far as it affects electricity brought into the state for sale therein both as burdening interstate commerce and as discriminating against such commerce. The Lexington Power Company and the South Carolina Power Company, in addition to their other positions, contend that their power plants for the generation of electricity, which are maintained in navigable rivers under authority granted by the federal government, are agencies of the federal government in aid of navigation and are not subject to taxation at the hands of the state. The following questions, therefore, are raised by the cases before us:

(1) whether the statute violates the fundamental guaranties of due process and equal protection contained in the 14th Amendment and in the Constitution of South Carolina;

(2) whether it violates the Commerce Clause of the Constitution with respect to electric current generated within the state and transmitted to other states or with respect to current brought in from other states and sold within the state; and

(3) whether it constitutes a burden upon a means or agency of the federal government with respect to those companies which are maintaining power plants in navigable streams under authority given them by Congress and the Federal Power Commission. We shall consider these questions in the order named.

Questions under the 14th Amendment and the Constitution of South Carolina

Complainants contend that the statute amounts to a denial of due process and equal protection: (1) because it does not tax generation of electricity by the use of oil or

internal combustion engines and does not tax persons furnishing gas to the public for light, heat or power; (2) [fol. 39] because it exempts from its operation industrial plants generating power for their own use or the use of their employees, and municipalities generating electricity for the use of their customers; (3) because it exempts from the sales tax electric current upon which the generation tax has already been paid; (4) because it is said that the statute is indefinite and fails to provide means for determining the tax on current brought from without and sold within the state; and (5) because it is said that, as to the tax imposed for the year 1931, the statute taxes power companies for the benefit of persons paying the general property tax levied by the state of South Carolina. None of these positions, we think, can be sustained.

As to the failure to tax gas companies and the generation of electricity by oil or the use of internal combustion engines, it is elementary that, in levying a tax, a state need not cover the whole field of possible taxation, but that it may classify for that purpose so long as the classification has a reasonable basis. State Board of Tax Com'rs of Indiana v. Jackson, — U. S. —, 51 Sup. Ct. 540; Alward v. Johnson, — U. S. —, 51 Sup. Ct. 273; Brown, Forman Co. v. Kentucky, 217 U. S. 563; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232. If not palpably arbitrary the classification is valid. Metropolis Theater Co. v. Chicago, 228 U. S. 61, 62; Toyota v. Hawaii, 226 U. S. 184. And it is the duty of the court to sustain it if any state of facts can be conceived of upon which the classification may reasonably rest. Rast v. Van Deman, 240 U. S. 342; Wampler v. Lecompte, — U. S. —, 51 Sup. Ct. 92; State Board of Tax Commissioners of Indiana v. Jackson, supra, —U. S. —, 51 S. Ct. 540.

In the case last cited, which involved the Indiana chain store tax, the rule is thus stated by Mr. Justice Roberts:

[fol. 40] "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of

subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations, Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580; 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' "

The act before us cannot be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat and power. The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the difference which might furnish a basis for the taxation of one and not the other is clearly unnecessary. The same is true of the production of electric current by the use of oil or internal combustion engines. The record shows that only two very small plants in the state of South Carolina are engaged in producing electricity in this manner; and, if the legislature knew of their existence at all, it may well have determined that [fol. 41] the volume of their business was so small and their relative cost of production so great as to put them in a class entirely different from the great power companies producing current from water power and coal. The purpose of

the legislature was evidently to tax the generation of electric current by the hydro-electric companies which utilize the water power in the rivers of South Carolina, one of the great natural resources of that state. The generation of current by the use of steam power was taxed because it is a matter of common knowledge that the hydro-electric companies use steam power to supplement water power in the production of their current and also because current produced by steam power is the great competing factor on the market with current produced by water power. In so far as companies producing electric current by means of internal combustion engines may sell the current produced, they are not exempted from the tax imposed by the statute, but are reached by the sales tax imposed by subsection (c) of section 1. We do not regard this, however, as a matter of importance in sustaining the tax imposed by subsections (a) and (b); for we are satisfied that the classification of companies producing electricity by water power and steam for purposes of taxation is a reasonable one which must be sustained.

In Quong Wing v. Kirkenhall, 223 U. S. 59, a statute was sustained which imposed a tax on hand laundries, but did not apply to steam laundries, and excepted from its operation laundries not employing more than two women. In Cargill v. Minnesota, 180 U. S. 452, a statute was sustained which required warehouses situate on the right of way of a railroad to secure a license from a state commission but made no such requirement of other warehouses. In Armour Packing Co. v. Lacy, 200 U. S. 226, an occupation tax was sustained upon meat-packing houses which distributed [fol. 42] their products from depots, although no such tax was imposed upon wholesalers and commision merchants. In Ohio River R. Co. v. Dittey (Ohio Tax Cases), 232 U. S. 576, an excise tax upon the gross earnings of railway companies was upheld, although no such tax was placed on the earnings of other public utilities. In Puget Sound Power Co. v. King Co., 264 U. S. 22, it was held that the property of a street railway company might be taxed upon a different basis from the property of steam railways. In Alaska Fish Salting Co. v. Smith, 255 U. S. 44, a tax was sustained upon the manufacture of fish oil, fertilizer and fish meal from herring, although at a greater rate than was imposed upon similar use of other fish. In Heisler v.

Thomas Colliery Co., 260 U. S. 245, it was held that a tax on anthracite but not on bituminous coal did not violate the equal protection clause, and that the fact of commercial competition between the two did not prevent the state from classifying them separately for purposes of taxation. In the light of these decisions, a statute which taxes companies producing electric current by water power and steam without taxing gas companies and the comparatively insignificant companies which produce current by the use of internal combustion engines, cannot be said to make an arbitrary classification which denies the equal protection of the laws.

Like reasoning applies to the contention that the statute denies the equal protection guaranteed by the Amendment in that it exempts from the tax industrial plants generating power for the use of themselves and their employees, and municipalities generating electricity for the use of their customers. Such industrial plants and municipalities are manifestly in an entirely different class from power companies generating electricity for sale to the public. So far as the exemption extended to industrial plants is concerned, the case is clearly governed by American Sugar [fol. 43] Refining Co. v. Louisiana, 179 U. S. 89, which dealt with a statute imposing a license tax upon persons refining sugar and molasses, but exempting from the tax "planters and farmers grinding their own sugar and molasses." In sustaining the constitutionality of the statute, the court, speaking through Mr. Justice Brown, said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market.

The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production."

Here the generation of electricity by manufacturers for the use of themselves and their employees is clearly no more than an incident of the business of manufacturing in which they are engaged and, both practically and theoretically, stands upon an entirely different footing from the generation of current for sale to the public. See also Armour & Co. v. Virginia, 246 U. S. 1, which sustained a taxing statute which imposed a tax on merchants based on the amount of their purchases, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale within the state, but excluded from its operation domestic manufacturers, taxed on capital by the state, who offered for sale at the place of manufacture goods manufactured by themselves. In upholding this statute against the charge that it denied the equal protection guaranteed by the 14th Amendment, Chief Justice White said that the distinction upon which the classification of [fol. 44] the statute rested was so obvious as to require nothing more than a mere statement of the two classes. We think the same is true of the classification here.

So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the 14th Amendment. See Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note.

Our attention is called to section 4, article 10 of the Constitution of South Carolina, which provides that "there shall be exempted from taxation all county, township and municipal property used exclusively for public purposes and not for revenue"; and the argument is made that the legislature, because of this provision, is without power to

exempt from taxation the business of a municipal lighting or power plant operated for revenue. The constitutional provision in question, however, merely requires that the legislature exempt from tax the property mentioned therein. There would seem to be nothing in it which would require the legislature to impose an excise tax on the business operated by municipalities; and in the absence of a holding of the Supreme Court of South Carolina to that effect we cannot give it such construction. As we said in Doscher v. Query, 21 Fed. (2d) 521, 528:

"The question as to whether the statute under consideration violates the Constitution of South Carolina has not been passed upon by the Supreme Court of that state; and federal courts are reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals, especially [fol. 45] where the statute is one affecting the revenues of the state. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 291; 26 S. Ct. 459, 50 L. Ed. 744; Coulter v. Louisville & Nashville R. Co., 196 U. S. 599, 609, 25 S. Ct. 342, 49 L. Ed. 615. They will not do so unless the case 'imperatively demands such a decision.' Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305, 34 S. Ct. 48, 51 (58 L. Ed. 229.)"

It is argued that the sales tax imposed by section (c) of the act violates the equal protection clause of the Federal Constitution and also the rule of uniformity prescribed by article 10, section 1, of the Constitution of South Carolina, because it exempts from the tax sales of current upon which the generation tax has already been paid. We think, however, that this point is entirely without merit. The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once (Cf. Texas Co. v. Brown, 258 U. S. 466, 479). If current produced as well as sold within the state were subjected to the sales tax, such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result

that all current sold within the state, whether produced there or brought in from another state, pays exactly the same tax. If there is any discrimination, it is in favor of the current brought in; for such current does not pay tax upon the "line loss", whereas the generation tax does not make provision for this loss. The situation is precisely that with which the Supreme Court dealt in Hinson v. Lott, [fol. 46] 8 Wall. 148. In that case the state of Alabama had levied a tax of 50 cents per gallon on all spirituous liquors manufactured within the state. A subsequent section of the act provided that dealers introducing such liquors into the state should, before offering same for sale, pay a similar tax upon every gallon thereof. What the Supreme Court said in answer to the contention that this constituted a burden upon and a discrimination against interstate commerce as to the liquor brought in answers equally the contention here that the exemption in favor of the current upon which the tax has been paid discriminates against the current brought in upon which it has not been paid. Said the Court:

"A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an at-

tempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

In Doscher v. Query, supra, 21 Fed. (2d) 521, we dealt with a statute of South Carolina imposing a stamp tax on the sale of tobacco products within the state and requiring the affixing of stamps by manufacturers, wholesalers and retailers, but providing that where stamps had been once affixed no further stamps should be required. The tax was [fol. 47] assailed, just as is the tax here, on the ground that it discriminated against unstamped products brought into the state in favor of products produced within the state upon which the stamp tax had been paid by the producer. And there, just as here, the tax was attacked as violative of article 10, section 1, of the South Carolina Constitution, and the decision in Standard Oil Co. v. Spartanburg 66 S. C. 37, 44 S. E. 377, was relied on. In upholding the validity of the statute, we said:

"It will be noted that the section (of the Constitution) relied on expressly authorizes graduated license taxes on occupations and business, and, if the tax in question be considered an occupation or business tax, graduation in accordance with sales would seem to be expressly authorized. If it be considered a tax on sales, there is nothing in the section of the Constitution to invalidate any of its provisions, as it is undoubtedly made at a uniform and equal rate, levying the same tax on all articles of merchandise of the same sort sold within the state. The idea that the rule of uniformity is violated because only one tax is imposed on each article and only one stamp is required to be placed on it, even though it may have been sold a number of times, is not well grounded. It is a matter of common knowledge that a tax of this sort is shifted from dealer to dealer and is ultimately paid by the consumer, and we can think of no better way of securing uniformity in a sales tax than by imposing the tax on the article itself, as is in effect done in this case.

"The question here is very different from that involved in Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377, especially relied upon by complainants. There an ordinance of the city of Spartanburg imposed a flat license tax of $250.00 per year on dealers in oils, but exempted

from paying the tax dealers handling oils on which the license had been paid. The Supreme Court of South Carolina held that the ordinance made an unreasonable classification, and was therefore void. But in that case the effect of the ordinance was to exempt from taxation dealers handling oils purchased from dealers who had themselves paid the flat license tax, the exemption applying not to the oil but to the dealer. Here no one is exempted from paying the tax imposed, but it is collected from the dealer or manufacturer who has the goods in possession prior to the first sale within the state. To provide that no one shall be required to pay an additional tax with respect to the sale of these particular goods, as to which we may safely assume that the tax paid is added to the price, is manifestly a very different thing from providing that retail dealers in oil shall be exempted from paying a [fol. 48] flat annual license tax because they happen to purchase from a wholesaler who has paid the same tax."

It is next argued by the complainant South Carolina Power Company that the statute deprives it of property without due process of law, in that it fails to provide any certain means for determining the tax on current brought into the state. The statute provides that it shall not apply to electric power generated in another state and brought into South Carolina until such power has lost its interstate character; and the objection is that no means is provided for determining when the current loses its interstate character and becomes subject to the tax. In the light of the evidence as to how current is brought into South Carolina by the South Carolina Power Company, however, this objection loses all substance. The current comes into South Carolina in interstate commerce on high tension wires at a voltage of 44,000 volts. All of it is used in South Carolina, but before it is used it is "stepped down" to a lower voltage and thus prepared for use in the state. As we shall show later, it loses its interstate character at this time. There is no difficulty in determining to a practical certainty how much current is thus "stepped down" and sold within the state of South Carolina, even though the high voltage current brought into the state is run over the same wires that carry the current produced in the state. The current generated in South Carolina by the South Caro-

lina Power Company and the current sold by it in that state are measured by its electric meters with absolute accuracy; and the method adopted in computing the tax on current brought in and sold is to add the total kilowatt hours coming into South Carolina (37,450,000) to the number generated in South Carolina (40,000,000); and from this total (77,450,000) compute the line loss (14,760,339 or 19%). This percentage of loss is applied on the current [fol. 49] coming into the state which gives the line loss on this current (7,115,500). This is subtracted from the current brought into the state; and the result (30,334,500) represents the amount of current brought into the state and sold. It is objected that there is no average of transmission loss; but the method adopted would seem to be reasonably fair and accurate, as much so, at least, as most methods in use for computing taxes on the profits of business, which are universally upheld. If absolute accuracy in matters of this sort were necessary to the validity of taxes, most modern taxing systems would be found invalid.

Little need be said as to the point that the tax is levied for the benefit of private persons paying the general property tax in that the statute provides that the proceeds of the tax for the year 1931 shall go to reduce the property levy for that year. Every tax levied, in theory at least, reduces other taxes. When a part of the public revenue is collected from excises, a smaller amount is required from the tax on property; and whether the legislature, after providing for the collection of an excise, takes this into account and prepares to balance the budget by levying a smaller tax on property, or whether, after making the levy on property, it provides that the revenue realized from an excise shall reduce that levy, is manifestly immaterial. In either event the amount raised by the excise is used for public purposes; and the fact that the property owner may have benefited by the levy of the excise because of the reduction of the taxes on property, is no more material in the one case than in the other. A tax cannot be said to be levied for the benefit of private persons simply because, on account of the revenue to be derived from same, the legislature has seen fit to lower the tax rate on their property. Whether a tax shall be raised or reduced, or whether revenue shall be raised [fol. 50] by one system or by another, are matters committed necessarily to the discretion of the legislature, with the exercise of which the courts cannot interfere.

Questions under the Commerce Clause

The principal questions under the commerce clause of the Constitution are based upon what is said to be the inherent nature of the generation and transmission of electric power. It is said that only so much power is generated as is needed to supply the user; that the whole system is so connected and regulated that, whether produced by water power or by steam, the generators produce only so much current as is called for at any given time by the use made of the current by the customer; that electricity travels at the rate of light, i. e., at the rate of 186,000 miles per second, with the result that current is generated and transmitted instantaneously to the customer when he signifies his need of it by turning on his light, motor or other device using current; and that the transmission of current to the customer in interstate commerce must be treated, therefore, as generation and transmission in response to order, which the state cannot burden by taxation. The process of generation and transmission is thus described in the affidavit of Dr. Robert A. Millikan, one of the most distinguished physicists of the country:

"The terms 'generation,' 'manufacture' and 'production' as applied to energy in the electrical form are merely convenient designations applied to one aspect of the process of transferring energy from some source in nature (such as falling water) to some point where it may be usefully applied. The various electrical facilities used in said process are purely transferring devices, and the entire combined process—electric, magnetic and mechanical—is integral, continuous and essentially simultaneous, as electricity travels approximately with the speed of light—186,000 miles per second.

"There is a continuous electrical and electromagnetic path between the windings in the generator and the windings in the consumer's motor (or between the generator windings and the filament in an electric lamp or the elec- [fol. 51] trodes in an electrochemical cell). The entire electric system is a device for transferring the force of the falling water to and applying it at the point where it is to be utilized. Except as, and to the extent that, energy is called for and used at the final point of utilization, the electric generator neither receives from the water wheel shaft

nor delivers to the electric transmission lines any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

* * * * * * *

"In the commercial generation, transmission and distribution of electricity the process is essentially unchanged. Electricity generated at different stations may, for commercial convenience, reliability of service, and similar factors, be brought together at a single distributing station or substation, as it is sometimes called, from which point it is in turn distributed over different lines to consumers' different points of use. If no consumer is using power on any distribution line no demand is placed on the generators and no electricity is generated, except as above stated, that necessary to hold the equipment under rotation and electric charge. If the aggregate electrical demand of the various consuming devices of the different consumers is less than the capacity of the generators, that part of the generating equipment which is not required to serve the immediate present combined demands of the various consumers remains idle, or delivers only such power or electricity as is required to meet the combined demands of the consumers. Similarly, meters placed at the generating station, or at any point between the generating station or stations and the distributing substation, register the power output (subject to losses as they vary from point to point) required to meet the then total demands of all the consumers, and the duration of such aggregate total demands. They afford measurements of aggregate consumers' use as well as measurements of generation, because the two are correlative.

"The various processes involved in stepping up and stepping down electricity through transformers involve no change in the essential nature of the electrical processes herein first above mentioned. They are merely devices adapted to the needs of the particular situation developed primarily with a view to efficiency and economy in operation. For illustration, electricity could be generated at 6600 volts and economically transmitted from the station for a distance of a few miles, and used by a consumer whose motors operated at that voltage without any process of transformation at either end of the circuit. This would probably be done under such conditions of transmission and

use. But as distances of transmission increase, transmission at such a relatively low voltage involves either ex- [fol. 52] cessive size of conductors or excessive losses in transmission and the economic and practical thing to do is to step up the voltage (increase the pressure) for economy in transmission. The transformers, therefore, are merely an aid to the transfer or transmission of energy in the electrical form, or what we call electricity."

We think, however, that the argument of complainants ignores or at least does not accord sufficient importance to the part played by the transformer in the system of electrical transmission. Electricity is produced at a low voltage. For transmission over long distances it is "stepped up" by a transformer to a very high voltage; and all of the current transmitted in interstate commerce by complainants is thus "stepped up" before transmission in such commerce. Before it can be used by the consumer it must be "stepped down" again to a low voltage; and all of the current received by complainants in interstate commerce is thus stepped down before being sold to or used by the consumer. And this "stepping up" or "stepping down" is not a mere change produced in the current. It is the production of a new and different current. The principle of the transformer is that the current flowing in the wires coming into the transformer sets up an induced current in the magnetic core of the transformer and this causes an induced current to flow in the wires going out of the transformer, the voltage depending upon the relative number of coils of the wires carrying the current in and those carrying the induced current out. These wires are insulated from each other, and the current going out is not the current coming in, but a new and different current, although induced by the former. Encyclopedia Britannica, 14th Ed., Article "Transformers". The current produced by induction in the transformer results from the use of the original current but is not that current, just as current produced by steam [fol. 53] results from the use of coal but is not the coal.

Now, so far as the production or generation tax on current is concerned, there can be no question as to its validity as applied to current transmitted in interstate commerce, we think, even though the current transmitted be conceived of as the identical current produced. The production of an article for transmission in interstate commerce is not

in itself such commerce. Leather Workers v. Herkert, 265 U. S. 457; United Mine Workers v. Coronado Co., 259 U. S. 344; D., L. & W. R. R. v. Yurkonis, 238 U. S. 439. And there can be no question but that such production is taxable by the state.

In Oliver Iron Co. v. Lord, 262 U. S. 172, the state of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that the tax on production was not a burden on interstate commerce, though the ore was destined for transportation in such commerce even before it was mined, the court, speaking through Mr. Justice Van Devanter, said:

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally effect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

The same holding has been made with respect to the production tax on gas (Hope Natural Gas Co. v. Hall, 274 U. S. 284); a tax on coal prepared and "ready for shipment or market" and destined for a market in other states (Heisler v. Thomas Colliery Co., supra); and a manufacturing tax upon goods sold in interstate commerce (American Mfg. Co. v. St. Louis, 250 U. S. 459).

[fol. 54] The case of Hope Gas Co. v. Hall, supra, supporting the production tax on gas, would seem to be directly in point as supporting the tax here; for the gas in that case, just as the electricity here, was transmitted immediately in interstate commerce. The fact that the gas went through pipes, whereas the electric energy is transmitted by wires, or that a longer time is required for the transmission of gas than is required for the transmission of electricity, or that gas is a material which is understood whereas electricity is a force which is not understood, would seem to make no difference with respect to the principal involved.

As pointed out above, however, it clearly appears that the current generated in South Carolina, upon which the

tax is imposed, is not the current transmitted in interstate commerce. The current upon which the tax is imposed is the generated low voltage current; the current transmitted in interstate commerce is the high voltage current induced in the transformers of the company. The statute does not attempt to impose a tax upon this.

And we think it equally clear that the tax imposed upon the sale of current does not burden interstate commerce as to current brought from without the state. The tax is not imposed on the high voltage current which passes in interstate commerce. It is imposed on the low voltage current which is sold to the consumer, and is an excise tax on the business of selling that current. The high voltage current which comes into the state is not sold. It is used to induce in the transformer the low voltage current which is sold. Even if the current sold be considered as the current which is brought in, it has gone through a process in which it has been "broken up" or changed from one current of high voltage to many currents of low voltage; and [fol. 55] it is these many currents of low voltage sold within the state upon the sale of which the tax is levied. While electric current can hardly be said to "come to rest" within a state, its interstate journey ends at the transformer which uses it for the production of low voltage currents for use within the state. The situation is the same in principle as the breaking up of an original package after shipment in interstate commerce (cf. Brown v. Maryland, 12 Wheat. 419, 443), or the breaking up of a cargo of oil after its interstate journey and the sending of it in tank cars to the points where needed within the state (A. C. L. R. Co. v. Standard Oil Co., 275 U. S. 257; A. C. L. R. Co. v. Standard Oil Co. (C. C. A. 4th), 12 Fed. (2d) 541), or the distribution of gas in low pressure pipes after it has been brought into the state in high pressure pipes in interstate commerce. East Ohio Gas Co. v. Tax Commission of Ohio, — U. S. —, 51 Sup. Ct. 499.

The case last cited is directly in point. There the state of Ohio had imposed a tax on the sale of gas within the state. A company brought in gas from other states in high pressure pipe lines. From these lines it was distributed to consumers by means of low pressure supply mains. The reduction of the current of gas from high pressure to low pressure for local use, while different mechanically, is the same from the standpoint of legal principle as the reduction

of a high voltage current to low voltage for local use. In sustaining the right of the state to impose the tax, the Supreme Court, speaking through Mr. Justice Butler, said:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. * * * But when the gas passes from the distribution lines into the supply [fol. 56] mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. State v. Flannelly 96 Kan. 372, 383-384, 152 P. 22; W. Va. & Md. Gas Co. v. Public S. Com., 134 Md. 137, 143-145, 106 A. 265; Cf. Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257, 269, 48 S. Ct. 107, 72 L. Ed. 270; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but a business of purely local concern exclusively within the jurisdiction of the state."

The point that the tax on sales is a discrimination against current which has passed in interstate commerce because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the 14th Amendment. The cases of Hinson v. Lott, supra, 8 Wall. 148, and Doscher v. Query, supra, 21 Fed. (2d) 521, 525, sufficiently answer this position.

The Question of Federal Agency

The South Carolina Power Company generates at its Stevens Creek plant on the Savannah River the electric current which it brings into the state of South Carolina; and it argues that in maintaining the dam and plant at which the current is generated it is acting as an agency of the federal government in aid of navigation and is not taxable by the state upon the generation or sale of the current there produced. The same point is made by the Lexington Power Company, the plant of which is maintained upon the Saluda [fol. 57] River. Both rivers are navigable streams and both plants were constructed under licenses from the federal government, license being granted to the South Carolina Power Company by certain acts of Congress and to the Lexington Power Company by the Federal Power Commission. Both companies point, just as did the Susquehanna Power Company in the case recently decided by the Supreme Court (51 Sup. Ct. 434) to the licenses granted them by the Federal government, to the fact that their plants were constructed in accordance with plans required under their license and approved by officials of the government, to the provisions of law subjecting them to regulatory and supervisory powers of the government extending to construction, maintenance, operation, financing, rates, service and accounting, and to the right of the government at the expiration of the license to take over and operate the property upon the payment of just compensation.

We cannot accept this contention. Complainants, in the production and sale of power, are not acting as agents of the government, but are engaged in private business for profit. To obtain licenses to build their dams in navigable streams, they have, it is true, consented to certain restrictions and conditions imposed by the government; but it does not follow that because of this they have made the private business in which they are engaged an instrumentality of the federal government and thus exempted it from taxation by the state. If a private business conducted for profit is to be exempted from taxation by one of our dual sovereignties because enjoying privileges granted subject to conditions by the other, most public service corporations would be able to escape either state or federal taxation. One had as well argue that a corporation enjoying the right of eminent do-

main under grant from the state is an agency of the state, and therefore not taxable by the federal government, as that [fol. 58] a corporation holding a license to build a dam in a navigable stream is for that reason an agency of the federal government and not taxable by the state. It is unthinkable that corporations of a state, carrying on private business protected by its laws, should escape the payment of excise taxes imposed upon such business, merely because they enjoy a license from the federal government which authorizes them to use the navigable streams of the state.

If this were an attempt to tax the license granted by the federal government, to discriminate in taxation against companies holding a federal license, or to tax a structure erected in aid of navigation, a different question would, of course, be presented; but nothing of the sort is involved in the case. We have simply the taxation of the private business done by the company which falls upon it in the same manner as upon other companies engaged in like business whether they are licensed to make use of the navigable streams of the state or not. See 6 R. C. L. 105-107; Thompson v. Pacific Railroad, 9 Wall. 579; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 154; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362; Susquehanna Power Co. v. State of Maryland, supra, — U. S. —, 51 Sup. Ct. 434. In the case last cited the Supreme Court, speaking through Mr. Justice Stone, laid down the principles which we think applicable here as follows:

"Assuming, for present purposes, that the license of the Power Commission is a federal instrumentality, immune from taxation or other direct interference by the state, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 524, 46 S. Ct. 172, 70 L. Ed. 384. [fol. 59] "With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private

business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. Ed. 579, and in Osborn v. Bank, 9 Wheat. 738, 867, 6 L. Ed. 204; see Union Pac. Railroad Co. v. Peniston, 18 Wall. 5, 34-37, 21 L. Ed. 787. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation."

Complainants attempt to distinguish the Susquehanna Power case on the ground that the tax there involved was a tax on property and not an excise tax on business. We think, however, that this is a distinction without a difference. An excise tax on production or sales is in effect a tax on the property produced or sold. Kehrer v. Stewart, 197 U. S. 60; Welton v. Missouri, 91 U. S. 275. And if the state may tax the property of the company used in the production or sale of electric current, there is no reason why it may not tax the current itself or, what is the same thing, its production and sale; for one tax is as much a burden upon what is said to be an agency of the government as the other. Mr. Justice Stone says, in the Susquehanna case, "the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage"; and the same distinction in principle exists here between the privilege or franchise granted by the government, i. e: the right to erect a dam in a navigable stream, and the business carried on by the grantee for private advantage, i. e. the production and sale of electric current.

[fol. 60] A point raised by the pleadings, but not stressed in the briefs, is that because of the franchise and income taxes already imposed by the state of South Carolina upon complainants, the tax in question violates the contract clause of the Constitution of the United States (Art. 1 sec. 10) and section 8 of Article 1 of the Constitution of South Carolina. It is clear, however, that the taxing power of the state was not exhausted by the imposition of the taxes referred to; and the taxing of the business of complainants by the act here in question impaired the obligation of no contract existing between the state and complainants. See Citizens Savings Bank v. Owensboro, 173 U. S. 636, and cases there cited.

For the reasons stated, we think that the interlocutory injunction prayed for must be denied. We have been impressed with the earnest argument of counsel, who point to the heavy taxes already required of them, and complain that the statute here will add a grievous burden to their load. This, however, is a matter for the Legislature of the state and not for us. We can grant relief from a taxing statute only when it offends some constitutional provision; and, for the reasons stated, we cannot say that the statute here under consideration so offends.

Interlocutory Injunction Denied.

We concur.

John J. Parker, U. S. Circuit Judge, 4th Judicial Circuit. Elliott Northcott, U. S. Circuit Judge, 4th Judicial Circuit. Ernest F. Cochran, U. S. District Judge, Eastern District S. C.

[fol. 61] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Sept. 7, 1931

In the above entitled cause the Court, after considering the pleadings and affidavits treated as evidence by stipulation of counsel, and hearing arguments of counsel on motion for interlocutory injunction, finds the followings facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the state of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1931, enacted a revenue statute, approved the 9th day of May 1931 and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition

of an Excise Tax upon Electric Power Generated and Sold within This State", which statute is set forth in full as an exhibit*s* to the bill of complaint; and that this suit is instituted by complainant to enjoin the defendants as members of the Tax Commission of the state of South Carolina from enforcing against it the provisions of said act and from collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, [fol. 62] complainant would be without an adequate remedy at law for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same must be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power and steam within the state of South Carolina, a part of which is used by it in operating a street railway system in the City of Columbia and a part of which it sells for lighting, power and other purposes, and the tax which complainant will be required to pay upon the electricity which it generates will be approximately $122,000 for the calendar year 1931.

7. That the complainant does not bring electric current into South Carolina from outside the State and pays no tax upon the sale of electric current, being taxed upon production only and expressly exempted by the act from the payment of tax on sales because of having paid the production tax.

8. That the state of South Carolina does not impose a tax upon gas companies nor upon companies generating electric current by the use of oil*s* or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the State of South Carolina producing electric current by the use of internal combustion engines, but these

plants are shown to be small and the business done by them to be comparatively insignificant.

9. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and there are a number of municipalities in the state of South Carolina generating electricity for the use of their customers.

[fol. 63] 10. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state upon which the generation tax has been paid is not subject to such sales tax.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

4. That the statute does not deprive complainant of property without due process of law in failing to provide means for determining the tax on electric current brought from without and sold within the state, as complainant is required to pay tax only upon the generation of electricity and not upon the sale thereof, and is not concerned with the tax levied on sales of electric current.

5. That the statute does not deprive complainant of property without due process of law because of the provision that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

6. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

[fol. 64] 7. That the statute does not violate section 1 of article 10 of the Constitution of South Carolina in exempting from the payment of the sales tax current upon which the generation tax has already been paid.

8. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the act.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That complainant is not entitled to the interlocutory injunction prayed.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina.

[fol. 65] IN UNITED STATES DISTRICT COURT

BROAD RIVER POWER COMPANY, Complainant,

versus

WALTER G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission, Defendants

DECREE DENYING INTERLOCUTORY INJUNCTION—Filed Sept. 7, 1931

This cause coming on to be heard on application of complainant for interlocutory injunction before the undersigned, constituting a court of three judges convened pursuant to section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits and arguments of counsel; and the Court having made and filed its findings of fact and conclusions of law as required by the equity rule of the Supreme Court, and being of opinion for the reasons therein stated, and more fully set forth in the written opinion filed herewith, that complainant is not entitled to the interlocutory injunction prayed:

Now, therefore, it is Ordered and Decreed that the interlocutory injunction prayed for be, and the same is hereby, denied; and it is further Ordered that the temporary restraining order heretofore granted be dissolved, provided, however, that the said temporary restraining order shall be continued in force for thirty days from this date for the purpose of preserving the status quo until the complainant shall have had opportunity to determine whether it will appeal to the Supreme Court and to take such steps as may be necessary and proper for the preservation of its rights pending appeal.

And this cause is retained for further orders.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern Dist. South Carolina.

[fol. 66] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT OF COUNSEL AS TO RECORD—Filed May 16, 1932

For the purpose of a final hearing by the three judge Statutory Court it is stipulated and agreed between counsel for the parties the court shall consider as testimony before it on such final hearing the entire record in this cause which was before the court at the Asheville hearing on application for interlocutory injunction.

It is further stipulated and agreed by and between counsel for the parties hereto that the "Findings of Fact" herein filed 7th September, 1931, and appearing at page 48 of the printed transcript of record hereto attached shall, subject to the court's approval be modified in the following particulars:

Amend findings of fact numbered six by changing the figure "85,000" to the figure "122,000", and by striking out "per year or more" and inserting in lieu thereof "for the calendar year 1931."

If all the above amendments are not fully sustained by the record it is nevertheless agreed by counsel that such amendments are facts and may be considered by the court as such and as if testified to in open court without contradiction.

Agreed to this 21 day of April, A. D. 1932.

J. Fraser Lyon, Attorney for Defendants. W. C. McLain, Attorney for Complainant.

Dated 21st April, A. D. 1932.

[fol. 67] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT AS TO HEARINGS—Filed May 16, 1932

It is stipulated and agreed by and between Counsel for the parties hereto:

1. That the final hearings on applications for permanent injunctions shall be heard by the three judge Statutory Court in the City of Asheville, North Carolina, on the 13th

day of June 1932 or at such other time as the Court may be called together for said hearing.

2. That said final hearings shall be upon an agreed statement of facts incorporated in stipulations and agreements of counsel dated 21st April 1932 and May 9th 1932.

3. That the Court in its final orders make provision for time for any party to perfect an appeal to the United States Supreme Court upon giving supercedeas bond in an amount to be agreed upon by counsel for the parties.

This stipulation is not intended to preclude the Court fro*n* finding such other and additional facts as may be revealed by the record herein.

J. Fraser Lyon, Attorney for Defendants. Hagood, Rivers & Young, M. Rutledge Rivers, Attorney-for South Carolina Power Company. W. C. McLain, Attorney for Broad River Power Company. W. C. McLain, Attorney for Lexington Water Power Company.

Dated May 11th, A. D. 1932.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER CALLING TOGETHER THREE-JUDGE COURT—Filed May 16, 1932

The plaintiff brought this suit for a permanent injunction. An application was made for an interlocutory injunction, which was pressed to a hearing and decision before three Judges under the provisions of Section 266 Judicial Code (U. S. Code, Title 28, Section 380). The case now comes up for final hearing on the merits, which must, under said provisions of law, be heard before three Judges. The counsel representing all parties have stipulated that the hearing on the final hearing on the merits be at Asheville, N. C. It is therefore

Ordered that Hon. John J. Parker, U. S. Circuit Judge, and Hon. Elliot Northcott, U. S. Circuit Judge, be and they are hereby called to the assistance of the undersigned, Hon. Ernest F. Cochran, District Judge; and the court as thus

constituted be the court to hear and determine the said suit for a permanent injunction. It is further

Ordered that the final hearing on the merits for a permanent injunction herein be and the same is hereby set down for hearing before said three judges as required by law at Asheville, N. C. on Monday, June 13, 1932, at ten o'clock A. M. It is further

Ordered that the Clerk of this Court or one of his deputies do attend this hearing at said time and place, and bring with him the entire record in this case.

Ernest F. Cochran, U. S. District Judge.

May 16th, 1932.

[fol. 69] In United States District Court

Opinion—Filed July 21, 1932

Parker, Circuit Judge:

These cases were before us some months ago on applications for interlocutory injunctions; and the legal questions involved were carefully considered at that time. See 52 Fed. (2d) 515. These orders denying interlocutory injunctions were affirmed on appeal to the Supreme Court. — U. S. —, 52 Sup. Ct. Rep. 494. On final hearing the facts have been stipulated; and, in our opinion, they are not materially different from the facts as found on the applications for interlocutory injunctions. No extended discussion of the case is, therefore, required. For the reasons stated in our original opinion, we think that we should deny the injunctions prayed and dismiss the bills. So far as the questions raised under the Commerce Clause of the Constitution are concerned, we are fortified in our conclusion by the recent decision of the Supreme Court in the case of Utah Power & Light Co. v. Pfost — U. S. —, 52 Sup. Ct. Rep. 548.

We desire to notice one question raised on the final hearing of the South Carolina Power Company's case which was not raised on the application for interlocutory injunction. This question relates to the tax on so much of its current as is sold to the Seminole, Aiken, Langley and Graniteville Mfg. Co. mil-s and to the towns of McCormick

and Bamberg. With respect to the current sold to the mills, it appears that this is supplied to them by wires connecting with the wires of the power company carrying high voltage current from its Stevens Creek plant. Wires from the high tension wires run to transformers owned by the mills; and the current is there stepped down and measured on the low voltage side of the transformers. In the case of the town of McCormick, a high voltage transmission line delivers current to it from the Stevens Creek plant. Before reaching McCormick, however, this line delivers current, with voltage reduced through transformers, [fol. 70] to consumers in four municipalities. The town of McCormick receives the current at the high voltage, reduces it, and sells it to consumers. In the case of the town of Bamberg, the voltage of the current is reduced by the company, but the current is sold by the town to the ultimate consumers.

We do not think that any of these special circumstances bring the current sold under the protection of the Commerce Clause of the Constitution. The power company is engaged in selling current locally within the state of South Carolina; and the tax complained of is imposed on sales in the course of this business. Of course, the state may not tax the interstate transmission or sale of electricity; but after the interstate journey of the current is ended and it becomes mingled with the current which the power company distributes and sells within the state, its sale unquestionably becomes subject to taxation by the state. The power company has a great system of lines within the state of South Carolina for the transmission and sale of electric current; and, when the current brought in from without the state reaches the lines used for this purpose, its interstate character is ended and it becomes subject to tax in the same manner as current produced within the state.

The bill of complaint of the power company shows that there is an inextricable intermingling on its transmission lines of the current brought from without and that produced within the state. In one place in the bill it is said: "The electrical energy brought from the state of Georgia and the electrical energy generated in complainant's steam plant in Charleston are fed into the interconnected transmission system of the complainant, the meeting point of

these two sources of supply being indefinite and changing from instant to instant." And at another place it is said: "The demands of complainant's various customers in South Carolina occur on various transmission and distribution [fol. 71] lines in such state, and these demands are supplied from the generating plants at Charleston, South Carolina, and Stevens Creek, Georgia (except that in the case of deficiency of flow in the Savannah River this demand to the extent of such deficiency is supplied from the system of the Georgia Power Company). There is thus created a continuing, combined demand on those two generating plants located in different states which exists throughout the entire interstate system." Certainly, if these allegations are accepted, there can be no question as to the power of the state to tax the local sales of current made from its current carried on its local distribution lines, which is the joint product of manufacture within and without the state; for such current has thus become mingled, as it were, with the mass of property within the state, and as such is subject to state taxation. Askern v. Continental Oil Co., 252 U. S. 444; General Oil Co. v. Crain 209 U. S. 211.

It is said, however, that notwithstanding the allegations of the bill, we should find that the current supplied to the town of McCormick is carried by a line not connected with any producing plant in South Carolina, and is therefore not mingled with any current produced within the state, and that the mills, while on a line connected with the producing plant at Charleston, S. C., are not reached by the current produced at that point. Even if this be assumed, we do not think that the position of the power company is helped. The fact remains that the lines which supply the town of McCormick and the mills in question are lines maintained for the local distribution and sale of electric current; and when current brought in from another state is placed on these lines for local distribution and sale, it loses its interstate character. And it makes no difference that delivery is made to the local customer at high voltage. [fol. 72] The quantity of current is measured not in volts but in amperes; and when current is drawn off the lines, the "original package" is broken and the amperage remaining on the lines is reduced. The line to McCormick, for instance, carries the current which the power company uses

to supply its customers in Merriwether, Modoc, Parksville and Plum Branch. The current which the lines carries is broken up for sale to these various users and the town of McCormick obtains only a part of the current carried on the line. The situation presented is not different in principle from that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. No one would question the power of the state to tax the business of such dealer.

The case of State Tax Commission of Mississippi v. Interstate Natural Gas Co., — U. S. —, 52 Sup. Ct. Rep. 62, upon which the power company particularly relies, is not in point. In that case, the company upon which the tax was levied was not engaged in business in the state which proposed to levy the tax. It merely sold natural gas which it had transported from another state to a local distributing company. Here not only is the power company engaged in the business of selling electric current locally, but the current sold to all of its customers is drawn from the lines which it uses for the purpose of carrying on the business of local distribution and sale.

There is no escaping the fact that the business of the South Carolina Power Company is primarily local in character. Its system of lines is used for the distribution and sale of electricity within the state of South Carolina. As stated above, a large part of the electric current distributed and sold by it is produced within the state, and the part brought from without the state is handled over the local distribution system and is distributed and sold locally. As [fol. 73] said by the Supreme Court in Missouri v. Kansas Gas Co., 265 U. S. 298, 309, with respect to the distribution and sale of natural gas:

"The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interfe*n*ence with interstate commerce, if any, indirect and of minor importance."

The case cannot be distinguished in principle, we think, from East Ohio Gas Co. v. Tax Com. of Ohio, 283 U. S. 465.

The tax complained of is levied not on sales made in carrying on commerce between the states, but on sales made in the operation of a local distribution system. It is immaterial that a part of the electrical energy used by such system is obtained from without the state; and it is likewise immaterial that distribution is made to some customers at a high voltage.

In all three cases, the prayers for permanent injunction will be denied and the bills will be dismissed.

Injunction denied and bills dismissed.

We concur.

John J. Parker, U. S. Circuit Judge. Ernest F. Cochran, U. S. District Judge.

See Judge Northcott's Concurrence.

[fol. 74] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 21, 1932

In the above entitled cause the Court, after considering the pleadings, affidavits and stipulation of the parties as to the facts, and hearing arguments of counsel, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the state of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the State of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1931, enacted a revenue statute, approved the 9th day of May, 1931, and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State," which statute is set forth in full as an exhibit to the bill of complaint; and that this suit is in-

stituted by complainant to enjoin the defendants as members of the Tax Commission of the state of South Carolina [fol. 75] from enforcing against it the provisions of said act and from collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, complainant would be without an adequate remedy at law for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same must be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power and steam within the state of South Carolina, a part of which is used by it in operating a street railway system in the City of Columbia and a part of which it sells for lighting, power and other purposes, and the tax which complainant will be required to pay upon the electricity which it generates will be approximately $122,000 for the calendar year 1931.

7. That the complainant does not bring electric current into South Carolina from outside the State and pays no tax upon the sale of electric current, being taxed upon production only and expressly exempted by the act from the payment of tax on sales because of having paid the production tax.

8. That the state of South Carolina does not impose a tax upon gas companies nor upon companies generating electric current by the use of oils or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the [fol. 76] State of South Carolina producing electric current by the use of internal combustion engines, but these plants are shown to be small and the business done by them to be comparatively insignificant.

9. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and there are a number of municipalities in the state of South Carolina generating electricity for the use of their customers.

10. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state upon which the generation tax has been paid is not subject to such sales tax.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

[fol. 77] 4. That the statute does not deprive complainant of property without due process of law in failing to provide means for determining the tax on electric current brought from without and sold within the state, as complainant is required to pay tax only upon the generation of electricity and not upon the sale thereof, and is not concerned with the tax levied on sales of electric current.

5. That the statute does not deprive complainant of property without due process of law because of the provision

that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

6. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

7. That the statute does not violate section 1 of article 10 of the Constitution of South Carolina in exempting from the payment of the sales tax current upon which the generation tax has already been paid.

8. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the act.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That the bill of complaint herein, should be dismissed for want of equity.

[fol. 78] This the 21st day of July 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 79] In United States District Court for the Eastern District of South Carolina

Broad River Power Company, Complainant,

v.

Walter G. Query, J. P. Derham, and Frank C. Robinson, as Members of and Constituting the South Carolina Tax Commission, Defendants

Final Decree Dismissing Bill—Filed July 21, 1932

This cause coming on to be heard before the undersigned, constituting a court of three judges convened pursuant to

Section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits, stipulation of the parties as to the facts and arguments of counsel; and the court having made and filed its findings of fact and conclusions of law as required by the Equity Rule of the Supreme Court; thereupon, upon consideration thereof.

It is ordered, adjudged, and decreed that the bill of complaint herein be, and the same hereby is, dismissed for want of equity, with costs to the defendants. This 21st day of July, 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 80] IN UNITED STATES DISTRICT

RESTRAINING ORDER PENDING APPEAL—Filed July 21, 1932

Whereas, in the above entitled cause a bill of complaint for a perpetual injunction has been filed and the cause has heretofore been heard by a court of three judges, composed of the undersigned, convened pursuant to the provisions of Section 266 of the Judicial Code and a final decree has been entered denying such application for an injunction and dismissing said bill of complaint; and

Whereas, the said Complainant has obtained an order allowing an appeal from said decree, and it appearing from the papers on file in this cause that there is danger of immediate and irreparable loss or damage to the Complainant unless the Defendants are, pending a hearing and determination of said appeal, restrained as herein set forth;

Now, therefore, it is ordered that the defendants, and each of them, their successors in office and their servants, agents, attorneys and counsellors be, and they hereby are, pending the hearing and determination of the appeal from the final decree herein, and until the further order of this Court, enjoined and restrained from enforcing, or taking any steps to enforce, directly or indirectly, against the Complainant above named, the terms and provisions of an Act of the General Assembly of South Carolina, approved May 9, 1931, [fol. 81] entitled "An act to raise revenue for the support

of the State Government by the imposition of an excise tax upon electric power generated and sold within this State".

Further ordered, that the Complainant herein give a bond in the sum of $10,000.00 conditioned to pay such damages as the Defendants may suffer if said Complainant shall fail to prosecute its appeal to effect and if it fails to make its plea good, which bond shall be with surety or sureties approved by the United States District Judge for the Eastern District of South Carolina and shall be filed within ten days from the date hereof.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, United States District Judge.

Dated July 21st, 1932.

I consent to the issuance of the foregoing order upon the execution of bond in the amount therein set forth, and consent that the order may be signed by the members of the statutory court separately and without assembling.

(Signed) J. Fraser Lyon, Solicitor for Defendants.

[fols. 82 & 83] Bond on restraining order for $10,000, approved and filed August 3, 1932, omitted in printing.

[fol. 84] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed July 21, 1932

Considering itself aggrieved by the decision and final decree of the Court of three judges convened in the above entitled case pursuant to Section 266 of the Judicial Code, the Complainant therein, Broad River Power Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Complainant assigns the following errors in the records and proceedings is said case:

1. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An act to raise revenue

for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' does not deny to Complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition [fol. 85] of an excise tax upon electric power generated and sold within this State'' does not deny to Complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' does not violate Section 1 of Article 10 of the Constitution of South Carolina in excepting from the payment of the sales tax current upon which the generation tax has already been paid.

4. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

5. The Court erred in holding that the Complainant is not entitled to the injunction prayed.

6. The Statute of the State of South Carolina enacted May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' is in contravention of the Constitution of the United States, especially the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to said Constitution.

[fol. 86] Prayer for Reversal

For which errors the Complainant, Broad River Power Company, prays that the said decree of the District Court of the United States for the Eastern District of South Carolina dated July 21st, 1932, in the above entitled cause be reversed and a decree rendered in favor of the said Complainant, and for costs.

Geo. M. LePine, W. C. McLain, Solicitors for Complainant. Elliot, McLain, Wardlaw & Elliot, Columbia, South Carolina; Travis, Paxson, Wallace & Philbin, 61 Broadway, New York, N. Y., Counsel.

In United States District Court

Order Allowing Appeal—Filed July 21, 1932

And now, to wit, on 21st July, 1932, it is ordered that the appeal be allowed as prayed for upon the filing of bond in the sum of $250.00, as required by Rule of the District Court.

Ernest F. Cochran, U. S. District Judge.

Bond on Appeal, $250.00 cash deposited by appellant.

[fol. 87] In United States District Court

Order Enlarging Time to File Transcript of Record—Filed August 24, 1932

For good cause shown, it is ordered that the time for filing the transcript of record on appeal in the above entitled cause with the Clerk of the Supreme Court of the United States, be enlarged from the 25th day of August, 1932, to the 24th day of September, 1932.

Ernest F. Cochran, U. S. District Judge.

August 24th, 1932.

[fol. 88] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—
Filed September 15, 1932

Bill of Complaint.
Exhibit "A", Revenue Act.
Application for temporary Restraining Order and Interlocutory Injunction.
Rule to Show Cause.
Answer.
Affidavit of W. L. Yoder.
Affidavit of Norman H. Coit.
Opinion.
Findings of Fact and Conclusions of Law.
Decree Denying Interlocutory Injunction.
Stipulation and Agreement of Counsel.
Order calling together three Judge Court for June 13, 1932.
Opinion.
Findings of Fact and Conclusions of Law.
Final Decree Dismissing Bill.
Restraining Order Pending Appeal.
Bond for Restraining Order Pending Appeal.
Petition for Appeal.
Assignment of Errors.
Prayer for Reversal.
Order allowing Appeal.
Bond for Costs on Appeal $250.00 cash deposited.
Order Extending time to file Transcript of Record dated August 24, 1932.
Stipulation as to Contents of Transcript of Record.
Citation.
Service of Citation.
Clerk's Certificate.

Geo. M. LePine, W. C. McLain, Attorneys for Complainant. J. Fraser Lyon, Attorney for Defendants.

Dated this 14th day of September, 1932.

[fol. 89] Citation, in usual form, showing service on J. Fraser Lyon, filed July 26, 1932, omitted in printing.

[fol. 90] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 91 & 92] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 6, 1932

Comes now the Appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Geo. M. LePine, Counsel for Appellant.

Due service of the foregoing is hereby admitted.

J. Fraser Lyon, Counsel for Appellees.

[fol. 93] [File endorsement omitted.]

Endorsed on cover: File No. 37,087. E. South Carolina D. C. U. S. Term No. 390. Broad River Power Company, appellant, vs. Walter G. Query, J. P. Derham, and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission. Filed September 22, 1932. File No. 37,087.